No. 86-999

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEW YORK, ET AL., PETITIONERS

v.

ELIZABETH DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

After remand from this Court's decision in *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), the Secretary of Transportation adopted Federal Motor Vehicle Safety Standard 208, which requires the installation of passive restraint equipment in all new cars after a four-year phase-in period beginning September 1, 1986, and permits manufacturers to comply with this requirement by installing airbags or automatic safety belts that may be either detachable or nondetachable. The question presented is whether Standard 208 is valid.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 802 F.2d 474.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1986. The petition for a writ of certiorari was filed on December 17, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 1394(a)(4).

STATEMENT

1. Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718, 15 U.S.C. (& Supp. III) 1381 *et seq.*, for the purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381. To that end, the Act directs the Secretary of Transportation to "establish by order appropriate Federal motor vehicle safety standards." 15 U.S.C. 1392(a). Such standards "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." *Ibid.* In addition, the Secretary must consider whether any proposed standard "is reasonable, practicable and appropriate" and "the extent to which such standards will contribute to carrying out the purposes of [the Act]." 15 U.S.C. 1392(f)(3) and (4).

In 1967, the Secretary promulgated Federal Motor Vehicle Safety Standard 208, which required the installation of manual safety belts in all cars. 32 Fed. Reg. 2408, 2415 (1967). Because the level of safety belt usage proved to be quite low, the Secretary in 1969 began to consider the utility of passive restraint systems. Passive restraint devices do not depend for their effectiveness upon any action taken by the occupant except that necessary to operate the vehicle. 34 Fed. Reg. 11148 (1969). Following this inquiry, the Secretary in 1972 adopted an amendment to Standard 208 that required "complete passive protection" in automobiles manufactured after August 15, 1975. 37 Fed. Reg. 3911 (1972). Standard 208 thereafter was reconsidered and modified on a number of occasions. See generally *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 35-37 (1983) (*State Farm*). Ulti-

mately, Standard 208 was amended in 1977 to require the phasing-in of passive restraints beginning with the 1982 model year. 42 Fed. Reg. 34289 (1977). The 1977 version, which became known as Modified Standard 208, permitted automobile manufacturers to comply by installing either airbags or automatic safety belts, which in turn could be either detachable or nondetachable. *State Farm*, 463 U.S. at 47; see also note 2, *infra*.[1] Modified Standard 208 was sustained on judicial review. See *Pacific Legal Foundation* v. *Dep't of Transportation*, 593 F.2d 1338 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979).

In early 1981, the Secretary reopened the rulemaking record (46 Fed. Reg. 12033), postponed for one year the beginning of the phase-in of passive restraints (*id.* at 21172), and requested public comment on the possible revision or rescission of Modified Standard 208 (*id.* at 21205). After receiving public comments, the Secretary rescinded the Standard. The Secretary concluded that there no longer was a reliable basis for finding that the passive restraint requirement would have significant safety benefits, and that the substantial costs of implementation counseled against retention of the requirement in the face of such uncertainty. *Id.* at 53419.

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[1] An automatic belt surrounds the occupant without any action on his part. A detachable automatic belt may be disconnected, typically by the use of a conventional latch, to permit the occupant to extricate himself in an emergency. A nondetachable automatic belt is equipped with an alternative means of emergency egress, such as a mechanism permitting the belt to be "spooled out." *State Farm*, 463 U.S. at 38-39, 46-47 & nn. 12 & 13, 55.

In 1983, this Court held in *State Farm* that the rescission of Modified Standard 208 was invalid under the Administrative Procedure Act, 5 U.S.C. 706. The Court specifically agreed with the Secretary that the Safety Act requires evaluation of the costs as well as the benefits of any proposed safety standard (463 U.S. at 42, 51, 54-55); that uncertainty furnishes a sufficient basis for declining to place a safety standard in effect (*id.* at 51-52); and that the rulemaking record need not contain evidence in direct support of the Secretary's determination of uncertainty (*id.* at 52). The Court concluded, however, that the Secretary's order rescinding Modified Standard 208 was arbitrary and capricious within the meaning of 5 U.S.C. 706(2)(A) because, in two respects, the Secretary did not adequately explain the basis for the rescission. First, the Court held that if it appeared that automatic belts would not produce significant safety benefits, the Secretary should have considered revising Modified Standard 208 to require installation of airbags in all cars (463 U.S. at 46-51). Second, the Court held that the Secretary had not adequately explained why automatic belts would not produce benefits sufficient to justify retention of Modified Standard 208. In particular, the Court found that the Secretary had failed to address the contentions of the insurance industry and others (i) that belt usage would be "substantially increased" by the installation of detachable belts, because a detachable belt that is attached or reattached would continue to function automatically until it was disconnected (*id.* at 53-59), and (ii) that Modified Standard 208 should be amended to require that all belts be nondetachable if detachable belts were thought to be inadequate (*id.* at 55-57). For these reasons, the

Court directed that the rulemaking be remanded to the Secretary for further consideration (*id.* at 57).

2. Following the remand from this Court, the Secretary issued several notices of proposed rulemaking and requested public comment regarding what action she should take with respect to passive restraints. 48 Fed. Reg. 48622 (1983); 49 Fed. Reg. 20460 (1984). After compiling a massive administrative record, the Secretary, on July 17, 1984, published the Final Rule at issue here (*id.* at 29009-29010, reprinted at Pet. App. 232a-236a), along with an extensive explanation of the supporting rationale (49 Fed. Reg. 28962-29009, reprinted at Pet. App. 50a-231a).

The Final Rule retains the passive restraint requirement in essentially the same form as that prescribed by Modified Standard 208, the rescission of which the Court overturned in *State Farm*. In particular, the current version of Standard 208, like the 1977 version, permits manufacturers to satisfy the passive restraint requirement through the installation either of airbags or of detachable or nondetachable automatic belts.[2] The Final Rule provides for the phasing-in of the requirement over a four-year period: each manufacturer must satisfy the Standard in 10% of its automobiles manufactured after September 1, 1986; in 25% after September 1, 1987;

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[2] The current version of the Standard, like its 1977 predecessor, may also be satisfied by other technology (such as enhanced padding of the automobile's interior) that is capable of meeting the performance requirements. Pet. App. 10a, 197a-198a. Although General Motors has conducted research on "passive interiors," no manufacturer has yet proposed to satisfy the Standard by such alternative means. See *id.* at 178a.

in 40% after September 1, 1988; and in 100% after September 1, 1989. Pet. App. 11a n.7, 57a, 233a-235a.

In order to furnish an incentive for manufacturers to install airbags and to improve airbag technology during the phase-in period, the Final Rule permits manufacturers to receive extra credit during that period if they rely on a technology other than automatic belts to afford passive protection to the driver. For each automobile containing such a non-belt device, the manufacturer will receive an additional credit for one-half of an automobile toward its overall percentage quota for the model year. Pet. App. 10a, 197a-198a, 234a-235a. And in order to encourage the States to enact and enforce mandatory safety belt use laws—which the Secretary found to be an inexpensive and effective way to save lives immediately (*id.* at 190a-191a)—the Final Rule contains an "automatic rescission feature" (*id.* at 14a). That feature provides that the passive restraint requirement will be rescinded if, by April 1, 1989, States having at least two-thirds of the Nation's population enact mandatory safety belt use laws that satisfy specified criteria (*id.* at 10a-11a, 186a-194a, 235a-236a).

3. The State of New York and officials of that State, who are the petitioners herein, sought judicial review of the Final Rule in the United States Court of Appeals for the District of Columbia Circuit. They challenged the Final Rule's automatic rescission feature. They also argued that the Final Rule was arbitrary and capricious insofar as the Secretary did not prescribe one of three alternative means of furnishing passive protection, viz., (i) airbags; (ii) either airbags *or* nondetachable belts; (iii) both air-

bags *and* nondetachable belts. Judicial review also was sought by insurance industry representatives and the other non-federal respondents herein. The non-federal respondents challenged only the automatic rescission feature of the Final Rule; they did not join petitioners in challenging the substance of the passive restraint requirement.

a. The court of appeals held that the challenge by petitioners and the non-federal respondents to the automatic rescission feature was not yet ripe for judicial review. The court explained that the requisite number of States had not yet enacted laws that satisfy the minimum standards necessary to trigger rescission under the Final Rule. Pet. App. 11a-24a. And the court noted that the automatic rescission feature "may well never be implemented" (*id.* at 23a).[3]

b. The court of appeals then rejected petitioners' three challenges to the substance of the Final Rule:

First, the court found that, contrary to petitioners' contention, "[t]he Secretary fully considered the suggestion that, as among automatic belts, only nondetachable rather than detachable belts be deemed to meet the federal standard" (Pet. App. 27a). The court cited the Secretary's determinations that a nondetachable belt is " 'the most coercive type of automatic restraint' "; that "imposing that particular requirement would create a 'serious adverse public reaction' "; and that this reaction could cause many owners to cut the nondetachable belts (*id.* at 27a (quoting *id.* at 169a, 203a)). The court also held that

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[3] The non-federal respondents have not sought review of the court of appeals' "ripeness" holding, and petitioners do not challenge the court's holding in that respect.

it was not arbitrary or capricious for the Secretary to rely in part on the fact that the mandatory installation of nondetachable belts would effectively force manufacturers to eliminate the center front seat in all new cars (*id.* at 27a-28a).

Second, the court of appeals held that the Secretary, consistently with this Court's mandate in *State Farm*, had analyzed "in considerable detail" the possibility of requiring airbags in all new cars and had reasonably declined to do so because of problems of cost and public acceptability (Pet. App. 28a-30a). The court explained that, under *State Farm*, the Secretary " 'is correct to look at the costs as well as the benefits of Standard 208' " (Pet. App. 29a (quoting 463 U.S. at 54)), noting the Secretary's estimate that airbags would cost $320 more per car than manual belts and in excess of $800 to replace. Although some parties had submitted lower cost estimates, the court held that such details of cost-benefit analysis are properly entrusted to the agency's expertise, and that, in view of the far higher estimates submitted by the manufacturers, the Secretary's projections were not arbitrary and capricious (Pet. App. 28a-29a). With respect to the public acceptability of airbags, the court pointed to the Secretary's recognition of the adverse effect of their high cost, as well as "public fears about chemicals used to deploy airbags, the possibility of inadvertent deployment of the devices, and the sense of insecurity harbored by some people at not having a belt wrapped around them" (*id.* at 30a). The court held that the Secretary had reasonably concluded that these concerns could best be addressed, not "by regulatory fiat," but by a marketplace in which airbags are one among several available options (*ibid.*).

Third, the court rejected petitioners' contention that the Secretary should have required both airbags and nondetachable belts in all new cars (Pet. App. 30a-31a). The court observed that, contrary to petitioners' contention, the Secretary in fact had considered that option (*id.* at 31a). As regards the merits of requiring both devices, the court explained: "Having concluded that non-detachable automatic belts posed public-acceptability concerns sufficient to preclude requiring manufacturers to install them (rather than detachable belts), the Secretary could reasonably decide not to require that non-detachable belts be used in tandem with airbags" (*ibid.*).[4]

ARGUMENT

The court of appeals correctly rejected petitioners' fact-bound objections to the Secretary's decision to promulgate the passive restraint requirement contained in the Final Rule. The Final Rule is the product of the Secretary's thorough reconsideration of the entire subject of mandatory passive restraints following this Court's decision in *State Farm*, and it is fully consistent with the Court's mandate and opinion in that case. Moreover, the decision of the court of appeals sustaining the Final Rule does not conflict with any decision of this Court or of another court of appeals, and it presents no legal issue of general importance. The Final Rule went into effect on Sep-

[4] Judge Mikva dissented (Pet. App. 32a-48a). He generally agreed with the majority's holding as to ripeness, and with its discussion of the standard and evidentiary dimensions of judicial review (*id.* at 32a-33a). He disagreed, however, with the majority's application of those principles in the particular circumstances of petitioners' three substantive challenges to the Final Rule (*id.* at 40a-48a).

tember 1, 1986, and the orderly transition to a fully-phased-in passive restraint standard would be seriously disrupted by further judicial or administrative proceedings. In these circumstances, further review is unwarranted at this time.

1. Petitioners first argue (Pet. 12-17) that the Secretary failed to give sufficient weight to safety when she promulgated the Final Rule. This contention is without merit.

a. Petitioners rely (Pet. 12) on the passage in this Court's *State Farm* opinion stating that, on remand, the Secretary "should bear in mind that Congress intended safety to be the pre-eminent factor under the Act" (463 U.S. at 55). However, when the Secretary promulgated the Final Rule, she expressly recognized, quoting the very passage from *State Farm* upon which petitioners rely, that " 'Congress intended safety to be the pre-eminent factor under the Motor Vehicle Safety Act' " (Pet. App. 183a-184a (quoting 463 U.S. at 55)). Indeed, precisely for this reason, the Secretary rejected the option of rescinding Modified Standard 208, as the Department had done in 1981 and as the automobile manufacturers once again urged (Pet. App. 103a). Instead, after studying the costs as well as the benefits of passive restraints, the Secretary essentially reinstated the Standard that was the subject of the *State Farm* litigation, requiring that all new cars have some form of passive restraint after a four-year phase-in period (Pet. App. 181a-194a, 204a-210a). The promulgation of a rule mandating passive restraints in the interest of motor vehicle safety scarcely can be thought to have failed to recognize the central role of safety under the Act.

b. Furthermore, the statutory text makes clear that safety is not the only consideration that the Sec-

retary must take into account. Under 15 U.S.C. 1392(a), a motor vehicle safety standard not only must "meet the need for motor vehicle safety"; it also must be "appropriate" and "practicable." The importance of these other factors is underscored by 15 U.S.C. 1392(f)(3), which reiterates that a standard must be "reasonable, practicable and appropriate." The Secretary in turn has a duty to assess a device's incremental contribution to safety in relation to these other factors, because she must consider not only whether but also "the *extent* to which such standards will contribute to carrying out the purposes of [the Act]." 15 U.S.C. 1392(f)(4) (emphasis added).

This Court recognized the importance of these other factors in *State Farm*. In the same paragraph of the *State Farm* opinion upon which petitioners rely, the Court stated that " 'the Secretary will necessarily consider reasonableness of cost, feasibility and adequate leadtime' " (463 U.S. at 55, quoting S. Rep. 1301, 89th Cong., 2d Sess. 6 (1966)). The Court also noted Congress's intent that the Secretary " 'conform to the requirement that the standard be practicable' " and take " 'economic factors' " into account (*ibid.*, quoting H.R. Rep. 1776, 89th Cong., 2d Sess. 16 (1966)). In accordance with these statutory requirements, the Court made clear that the Secretary "is correct to look at the costs as well as the benefits" of passive restraints (463 U.S. at 54). And as the court below observed, the Department " 'cannot fulfill its statutory responsibility unless it considers popular reaction,' " in order to ensure that a standard will both meet the need for safety and be "practicable" (Pet. App. 27a (quoting *Pacific Legal Foundation*, 593 F.2d at 1345-1346)).

Against this background, it is not surprising that petitioners concede that the Secretary was required to consider factors besides safety, and they accordingly challenge only what they perceive to be the relative weight given by the Secretary to the various factors in fashioning the Final Rule. See Pet. 12, 14. However, the court of appeals was surely correct that in the context of a standard that concededly takes a firm step in advancing the statutory goal of motor vehicle safety, "such details of cost-benefit analysis are 'most appropriately entrusted to the expertise of an agency,' especially where, as here, the evidence runs in contrary directions" (Pet. App. 29a, quoting *Office of Communication of United Church of Christ* v. *FCC*, 707 F.2d 1413, 1440 (D.C. Cir. 1983)). Cf. *Bowen* v. *Owens*, No. 84-1905 (May 19, 1986), slip op. 8.

c. Petitioners appear to argue, however, that the Act bars the Secretary from comparing the *relative* cost-effectiveness of different passive restraint devices. Instead, petitioners say that the Secretary must mandate the installation of the device that yields the greatest safety benefits (in petitioners' view, the airbag)—even if it is substantially more expensive than other alternatives—so long as its cost could be found to satisfy some abstract standard of reasonableness and the device is "generally acceptable" to the public. See Pet. 12, 14, 20. As we explain below (see pages 13-14, *infra*), petitioners' premise that airbags are unquestionably superior to automatic belts from a safety perspective is flawed. But however that may be, nothing in the Safety Act or *State Farm* supports the approach petitioners urge.

In order to determine whether the cost of any given device is "reasonable" (15 U.S.C. 1392(f)(3)), it is necessary to consider whether the incremental

cost of the device, when compared with less expensive alternatives, produces incremental safety benefits that warrant the additional expenditure. A similar comparison of the relative acceptability of various devices to the public is required in order to determine whether any particular device is "practicable" (15 U.S.C. 1392(a) and (f)(3)). Petitioners themselves concede that, at *some* point, the Secretary may rely upon the cost or unacceptability of a safety device as a ground for declining to mandate its installation: they state that "[c]ertainly the Safety Act does not require DOT to require $30,000 safety systems on each car, no matter how much safety improvement would result" (Pet. 20). Petitioners therefore object only to the point at which the Secretary has drawn the line in the particular circumstances of this case. But the identification of the precise point at which cost (both in absolute and relative terms) outweighs safety benefits, particularly when there are a number of available technologies that furnish protection to occupants, requires a complex judgment that is committed to the Secretary's expertise.

2. Petitioners' contention that the Final Rule is arbitrary and capricious because the Secretary did not adopt one of the three alternatives they advance is equally without merit.

a. The record establishes that the Secretary fully considered petitioners' contention (Pet. 9-10, 13-15, 17-21) that airbags should be mandated in all new automobiles. The Secretary gave four sound reasons for rejecting that option:

First, the Secretary found that although airbags are quite effective in certain circumstances, they also have a number of disadvantages from a safety perspective. Airbags do not provide protection in low-

speed, rear-end, or rollover collisions, and their effectiveness in side crashes also is uncertain. In addition, there are substantial effectiveness problems associated with airbags in small cars and in protecting out-of-position occupants, particularly small children. Pet. App. 72a-75a, 96a, 142a-145a, 164a-167a, 182a, 202a-203a.[5]

Second, the Secretary was properly concerned about the high cost of airbags and the effect of that cost on public acceptability, especially for persons who already use safety belts (Pet. App. 152a, 165a, 199a-200a). The Secretary projected that airbags will add $320 to the cost of a new car and $44 in higher fuel costs, and that the replacement cost of an airbag following deployment will be $800 (*id.* at 159a, 165a, 199a). The potential impact of these costs was made even more significant by the discrepancy between the Secretary's estimate and the far higher estimate by the automobile manufacturers that the initial price

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[5] Petitioners rely (Pet. 9-10) on a table of projections in the preamble to the Final Rule to support their argument that airbags necessarily would yield greater safety benefits than automatic belts. This reliance is misplaced. The relative benefit of the various options depends upon assumptions about the effectiveness of the respective passive restraint systems in preventing deaths and serious injuries and the projected usage of automatic belts. If the actual usage rate for automatic belts tends toward the upper end of the 20-70% range projected by the Secretary, and if the more optimistic projections of effectiveness are borne out for automatic belts but not for airbags, the safety benefits produced by automatic belts would exceed those of airbags. Because the ranges of safety benefits projected for airbags and automatic belts substantially overlap in this manner, the Secretary did not act arbitrarily by adopting a standard that permits the installation of either device.

increase attributable to the installation of airbags would be $800 (*id.* at 82a, 199a-200a).

Third, the Secretary found indications of a significant adverse public reaction to airbags, stemming from concerns about inadvertent deployment, lack of assurance that they will work when needed, and possible health risks associated with the sodium azide used for rapid inflation (Pet. App. 152a, 164a-166a, 200a-201a). Although the Secretary believed that "these concerns can be adequately addressed," she observed that "these consumer perceptions must be recognized as real concerns" (*id.* at 202a). The Secretary therefore reasonably concluded that a rule mandating installation of airbags in all cars would encounter the most pronounced problems of public acceptability (*id.* at 185a), and that "[i]t may be easier to overcome these concerns if airbags are not the only way of complying with an automatic occupant protection requirement" (*id.* at 202a). Under the latter approach, "if people have concerns about airbags, they can purchase automobiles that use auto matic belts." At the same time, the "real world experience" resulting from the manufacture and use of some cars with airbags can perform an educative function and allay the fears of others. *Ibid.*[6]

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[6] Petitioners do not dispute the Secretary's finding that there would be public acceptability problems with the mandatory installation of airbags in all new cars. They argue only that the record "runs both ways" on this issue and that, on a "mixed record," the Secretary was required to mandate the installation of airbags because of what petitioners view as their "clear safety advantage" (Pet. 21-22). As we have explained (see pages 13-14, *supra*), it is not so clear that airbags would prove to have a distinct safety advantage. In any event, although some segments of the public may respond favorably to airbags, the best way in which to address the

Fourth, the Secretary concluded that to mandate the installation of airbags in all cars would run the risk of "stifl[ing] innovation" and thereby "seriously retarding development of more effective, efficient occupant protection systems" (Pet. App. 202a-203a). In a related vein, the Secretary also expressed some concern as to whether she had the authority to mandate the installation of one particular type of passive restraint device, rather than prescribing performance criteria (*id.* at 202a). These considerations, together with those discussed earlier, clearly demonstrate that the Secretary's decision not to mandate the installation of airbags in all new cars was, at the very least, not arbitrary or capricious.

b. Petitioners next contend (Pet. 10-11, 15-16, 22-23) that the Secretary acted arbitrarily in declining to adopt petitioners' second alternative proposal, viz., a requirement that any automatic belts permitted under Standard 208 be nondetachable. Contrary to petitioners' contention, the Secretary fully considered this option and amply explained her reasons for rejecting it. See Pet. App. 168a-170a, 203a.

As an initial matter, petitioners err in suggesting (Pet. 15, 23) that the Secretary found that nondetachable belts would produce substantially greater safety benefits than detachable belts. The Secretary stated that, contrary to the administrative evaluation that led to the rescission of Modified Standard

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negative reaction of other segments of the public—a negative reaction that petitioners concede also exists—is committed to the expert judgment of the Secretary. The incentive in the Final Rule for manufacturers to install airbags during the phase-in period (see page 6, *supra*) may help to overcome some of these public acceptability problems. See Pet. App. 202a.

208 in 1981, she now believed that detachable automatic belts would be used more than manual belts. In reaching this conclusion, the Secretary expressly relied (Pet. App. 170a, 206a) upon this Court's assessment in *State Farm* that even though a detachable belt, once detached, operates like a manual belt, the belt will function automatically if it is reattached. 463 U.S. at 54. The Secretary then quoted the Court's further analysis (*ibid.* (emphasis in original; footnotes omitted)):

> Thus, inertia—a factor which the agency's own studies have found significant in explaining the current low usage rates for seatbelts—works in *favor* of, not *against*, use of the protective device. Since 20% to 50% of motorists currently wear seatbelts on some occasions, there would seem to be grounds to believe that seatbelt use by occasional users will be substantially increased by the detachable passive belts.

The Secretary did conclude that the usage rate of detachable belts would be somewhat lower than that of nondetachable belts. As petitioners concede (Pet. 10-11), however, the Secretary was unable to quantify the difference in the usage rates because of the absence of reliable data (Pet. App. 138a). Thus, neither the record nor the Secretary's findings support petitioners' apparent contention that the safety benefits of nondetachable automatic belts would greatly exceed those of detachable belts.

By contrast, the record and the Secretary's findings clearly do establish that nondetachable belts, which "are probably the most coercive type of automatic restraint" (Pet. App. 168a-169a), have substantial disadvantages as compared with the detachable variety. The Secretary noted that "some people

will certainly find [nondetachable belts] uncomfortable, cumbersome, and obtrusive" and will fear being entrapped by them (*id.* at 168a). A hostile public reaction in turn could lead many people to cut nondetachable belts, and in fact surveys in the record indicated that between 10% and 20% of the public might do so. The result would be a *permanent* loss of passive protection, in contrast to the temporary loss that would result from disconnection of a detachable belt. That permanent consequence would endanger not only the original owner and his passengers, but also subsequent owners and occupants. Because the average automobile has two or three owners, the resulting unavailability of belts could increase to 50% over the average 10-year life of a car. *Ibid*; see also *id.* at 97a-98a. The Secretary also found it significant that nondetachable belts cannot be used if the vehicle has a center front seat and that such belts make more difficult the proper installation of child-restraint seats, which are required by law in most States. *Id.* at 169a-170a.[7]

Against this background, the Secretary reasonably concluded that the uncertain benefits of nondetachable belts did not outweigh their distinct disadvantages, at least not with sufficient clarity to justify a requirement that all belts installed to comply with the Final Rule be nondetachable. Pet. App. 168a-170a, 203a. Compare *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844 (1984).

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[7] Petitioners concede that nondetachable belts are not compatible with a center front seat; petitioners' only response is that the Secretary should have either required airbags or permitted detachable belts in cars that have center front seats. See Pet. 15-16, 23. However, it was not arbitrary and capricious for the Secretary to decline to adopt such a standard.

c. Finally, petitioners argue (Pet. 11, 16-17, 24-26) that the Secretary acted arbitrarily in declining to adopt petitioners' third proposed alternative, viz., the mandatory installation of both airbags *and* nondetachable belts in all new cars. This argument is completely without merit.

Petitioners' threshold contention (Pet. 16, 24-25) that the Final Rule should be invalidated because the Secretary did not consider this most burdensome of all options is insubstantial. This Court stressed in *State Farm* that it will " 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' " 463 U.S. at 43 (quoting *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 286 (1974)). As the court of appeals concluded below, the Secretary's path to the omission of a requirement that both airbags and nondetachable belts be installed may "reasonably be discerned" (Pet. App. 30a). In her explanation of the rationale for adopting the Final Rule, the Secretary included a section addressing the option of "Airbags and/or Nondetachable Seatbelts" (*id.* at 203a). That section in turn referred to the Secretary's prior discussion of the problems associated with airbags and nondetachable belts (*ibid.*). The court of appeals explained that the Secretary's earlier discussion of the disadvantages of airbags and nondetachable belts, considered separately, was "obviously germane to the desirability of requiring the combination of the two" (*id.* at 31a), especially since such a requirement "would obviously do nothing to relieve the Secretary's concerns about the primary drawbacks of the devices, namely cost and public acceptability" (*id.* at 31a n.28).

On the merits, the Secretary's decision not to require that manufacturers install both airbags and nondetachable belts clearly was not arbitrary or capricious. As the court of appeals held, "[h]aving concluded that non-detachable automatic belts posed public-acceptability concerns sufficient to preclude requiring manufacturers to install them (rather than detachable belts), the Secretary could reasonably decide not to require that nondetachable belts be used in tandem with airbags" (Pet. App. 31a). Petitioners' proposed requirement would also deprive consumers of the option of purchasing any one of several alternative forms of passive restraint protection, an option that the Secretary reasonable determined would substantially further the statutory goal of public acceptability (*id.* at 185a).

3. Quite aside from the correctness of the decision below on the merits and the absence of any circuit conflict on the controlling legal issues, practical considerations weigh against review by this Court. Almost 15 years have passed since the Secretary first promulgated a passive restraint requirement in 1972. The passive restraint requirement in the Final Rule, which the Secretary prescribed on the basis of her thorough consideration of the various issues following this Court's decision in *State Farm*, should now be given the opportunity to operate and be tested in actual practice. The Secretary then will be able for the first time to collect data regarding the actual cost, usage, effectiveness, and public acceptability of various devices. There will be time enough to consider possible modifications to Standard 208 in the future if the wisdom of that course is suggested by experience under the Final Rule.

Furthermore, the phase-in of passive restraints under the Final Rule began in September 1986, with the requirements that 10% of all new cars satisfy Standard 208. Beginning September 1, 1987, 25% of all new cars must comply with the Standard. If this Court were to grant review, a decision on the merits would presumably not be rendered until the Spring of 1988. By that time, the manufacturers will have completed their plans for the third year of the phase-in beginning September 1, 1988, and they will have substantially completed their plans for universal coverage of all new cars by September 1, 1989. This orderly implementation of the passive restraint standard—a standard that has been challenged at this point only by petitioners, not by the insurance industry, consumer groups, or the automobile manufacturers—should now be permitted to proceed without further uncertainty.

It also is significant that, since the Final Rule was promulgated, at least 23 additional States and the District of Columbia have enacted mandatory safety belt use laws. Such laws now cover approximately 70% of the Nation's population.[8] The court of appeals observed (Pet. App. 15a) that many of these laws may not satisfy the standards in the Final Rule, and therefore would not necessarily count in determining whether the "automatic rescission feature" of Standard 208 would be triggered. Nevertheless, these laws have brought about a significant increase in the usage of safety belts. Data supplied by the Department of Transportation show that post-enactment usage rates range from a low of 23% in Kansas

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[8] When the Final Rule was promulgated, only New York had enacted such a law. Pet. App. 175a.

to a high of 75% in North Carolina, and that the usage rate in New York, whose residents petitioners represent, is 46%. Usage rates may increase still further on a nationwide basis as a result of the enactment of more mandatory use laws, enforcement efforts under existing laws, new habits of occupants, public education, and the automatic feature of the safety belts that are now being installed to comply with the Final Rule. As belt usage increases, the incremental safety benefits of airbags decrease. The recent and widespread enactment of mandatory use laws thus renders even more reasonable the Secretary's decision not to require the installation of airbags in all new cars.

At the same time, we have been informed by the Department of Transportation that at least eight models of automobiles having airbags to protect the driver will be available during the 1987 model year. This information suggests that airbags may be marketed and purchased on a voluntary basis under the Final Rule in a manner that will promote their public acceptability, without the disadvantages associated with mandating that particular form of passive protection. Further developments reasonably may be expected in future model years, as manufacturers, consumers, and occupants respond to new public attitudes, the judgments of numerous states legislatures, and market alternatives.

Especially in light of these changing circumstances and the substantial grounds for optimism with respect to the usage and acceptance of passive restraint devices, there is no occasion for this Court to review the Final Rule and the court of appeals' decision sustaining that Rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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